No. [redacted]102

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PETITIONER,

VS.

RAYMOND BROS. CLARK COMPANY.

BRIEF OF RESPONDENT.

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No. 535.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION, PETITIONER,

VS.

RAYMOND BROS. CLARK COMPANY.

STATEMENT OF CASE.

The respondent, deeming the statement of facts presented by the petitioner to be incomplete and to incorrectly reflect the record, desires to controvert the same.

On the 5th day of January, 1920, the Federal Trade Commission complained of Raymond Bros. Clark Company, under the provisions of Section 5 of the Federal Trade Commission Act.

The complaint alleges the making of preliminary investigations by the Commission and the belief, upon its part, that the respondent Raymond Bros. Clark Company had engaged in business practices (Rec. 5) constituting unfair methods of competition, in violation of Section 5 of the Act of Congress referred to. The

allegations of the complaint base the charge of unlawful practices upon a single business transaction. The respondent is alleged to be a wholesale grocer and engaged in business in the city of Lincoln, Nebraska, and the business transaction alleged to constitute unfair competition, charges a resulting injury to Basket Stores Company and to T. A. Snider Preserve Company. The Basket Stores Company was a corporation with its principal place of business in the City of Omaha and maintaining branch stores in the City of Lincoln and elsewhere for the sale of groceries to consumers.

The complaint sets forth the following as the specific acts constituting unfair methods of competition:

In September, 1918, T. A. Snider Preserve Company shipped a car load of its products from Marion, Indiana to Lincoln, Nebraska, consigned to this respondent. This car included products sold to and intended for delivery to Basket Stores Company as well as products sold to and intended for respondent and others. When this car of merchandise arrived respondent declined to deliver the products intended for delivery to Basket Stores Company unless T. A. Snider Preserve Company would pay respondent one hundred ($100.00) dollars as a jobber's profit. The complaint then makes the following charges:

(a) That respondent, at divers times, attempted to coerce T. A. Snider Preserve Company to refuse to recognize the Basket Stores Company as a jobber; to refuse to sell its products to Basket Stores Company at prices regularly charged recognized jobbers.

(b) That respondent, at divers times, represented that the Basket Stores Company was not a legitimate jobber but was engaged in the retail grocery business.

(c) The respondent, at divers times since September, 1918, threatened to withdraw its patronage from said T. A. Snider Preserve Company if said company sold to or recognized the Basket Stores Company as a jobber and refused to pay respondent the one hundred ($100.00) dollars demanded.

The complaint alleges that the effect of the acts and practices charged to have been engaged in by the respondent was to stifle competition and to interfere with the Basket Stores Company and T. A. Snider Preserve Company in trading with each other.

This complaint was regularly answered by the respondent admitting the corporate capacity of all parties involved and that the products manufactured by T. A. Snider Preserve Company moved in inter-state commerce as alleged. The answer, by a course of specific and general denials, puts in issue all of the other matters alleged in the complaint.

The answer after specifically denying that the Basket Stores Company is in competition with respondent affirmatively alleges that respondent was engaged in the operation of a wholesale grocery establishment, confining its sales to retail groceries for re-sale to consumers while the Basket Stores Company is engaged in the operation of retail stores in direct competition with the customers of respondent. The respondent further alleges that it could not, in fact, purchase the products of T. A.

Snider Preserve Company for re-sale to retailers so long as T. A. Snider Preserve Company was engaged in selling its products direct to the retail trade at the same price it was selling its products to the wholesaler.

The respondent admits in its answer that it told the T. A. Snider Preserve Company that it would not purchase its products if it sold the same to the Basket Stores Company and that it could not handle such products for resale to retailers who must sell the same in competition with the retail stores of the Basket Stores Company. The respondent also admitted in its answer that it demanded from the T. A. Snider Preserve Company the sum of one hundred ($100.00) dollars as compensation for its service in delivering the products consigned to it by T. A. Snider Preserve Company and intended for the Basket Stores Company. The answer alleges that the controversy is a purely local one and of it the Federal Trade Commission does not have jurisdiction.

The evidence upon the hearing presents a rather short story and is free from serious contradictions. The Basket Stores Company is a corporation organized under the laws of the State of Nebraska and engaged in the operation of retail grocery stores. It maintains a warehouse in the City of Omaha for the purpose of gathering together merchandise in sufficient quantities to supply its various establishments. The company, at the time involved in this controversy, was engaged in operating 72 retail grocery stores (Rec. 58). Of these stores 26 were located in Omaha and 17 in Lincoln (Rec. 61). In order to supply these retail grocery stores with merchan-

dise the company purchased largely from manufacturers and producers but found it necessary to purchase 34.57% of its total requirements from wholesale grocery establishments in the cities of Omaha and Lincoln during the year 1918 (Rec. 60). The Basket Stores Company purchased large quantities of butter, eggs and other farm products at its various country stores and the produce so acquired was sold by it to different jobbers and other retailers. This is the common practice engaged in by all retail stores in the central west (Rec. 63). The proportion of the business of the Basket Stores Company, comprising sales to jobbers and other retail establishments and which included a disposition of butter, eggs, poultry and farm produce will not exceed ten per cent of its total business. The total business for the year 1918 aggregated two and a half million dollars.

A retail grocer, as defined by the record of this case, is one who generally sells direct to consumers and a wholesaler is one whose general practice is not to sell direct to consumers but is to sell generally to retailers (Rec. 42). The advertisements of the Basket Stores Company openly declare its purpose and plan to cut out all middlemen (Resp. Ex. 2, 9, 12, 21 and 31).

In Exhibit 31 (Rec. 125) the Basket Stores Company, in published announcement, proclaims its purpose to engage in the operation of a retail grocery store in competition with the independent retailers who patronize the wholesale grocers.

> "W. D. Williams here tells something of the future plans of the Basket Stores Co.: The cash

and carry plan, to my mind, is the coming method of distribution. What we propose to do is to bring the producer just as close as possible to the consumer.

During this High-Cost-Of-Living time, which apparently is here to stay until the allies win the war, we are going to open many more stores for the convenience of the buying public.

* * * * * * * *

Ten years ago, we had but one store—today we are operating forty-four stores in Omaha, Lincoln, Council Bluffs and surrounding territory. Our business has grown from a one-store volume of $12,000 to forty-four stores doing a business of $2,143,093.00 in 1917.

The ordinary grocery store has the following expenses: Delivery cost 20 per cent; charge accounts, bad debts, collections and bookkeeping, 10 per cent. The Cash-and-Carry plan saves you all of this expense.

* * * * * * * *

We intend to operate more self-serve stores; the customer can bring her basket, go direct to the shelves, counters and tables and pick out just what she wants. Everything will be plainly marked with the price and weight. We are going to do away with all expensive packages possible, and put a price on the merchandise that will pay our customers to come and pick out what they want and carry it home."

The established sales policy of T. A. Snider Preserve Company, adopted by it and generally practiced, was to distribute its products exclusively through wholesalers and not to sell retailers (Rec. 40). Mr. Davis, the sales manager for T. A. Snider Preserve Company, testified that he knew respondent sold its merchandise exclusively to retailers and that the customers of re-

spondent engaged in the retail grocery business in Lincoln were in direct competition with the eighteen retail stores operated by Basket Stores Company in that city. He recognized that the Basket Stores Company was engaged in the operation of retail stores and as a rule his company did not ship to retailers other than to make a shipment through a selected jobber.

Sometime in September, 1918, the T. A. Snider Preserve Company sold to Raymond Bros. Clark Company, the items of its product set forth in respondent's answer (Rec. 5). It also sold to Basket Stores Company and to other wholesalers, the items of its product set forth in respondent's answer (Rec. 6-7). It is not contended that at the time sales were made, any of these customers of the Snider Company had knowledge of the sales made to others nor is it contended that there was any arrangement made as to the method of shipment. T. A. Snider Preserve Company prepared the several orders for shipment, as shown by Exhibit No. 2 (Rec. 46). All of the orders were included in a single shipment and loaded in one car and consigned to Raymond Bros. Clark Company. This method of shipment was adopted by T. A. Snider Preserve Company because each shipment aggregated less weight than a minimum car weight and all of the orders combined aggregated a sufficient weight to procure car load rate of shipment. Raymond Bros. Clark Company had no knowledge that this car load of merchandise was to be consigned to it and had no knowledge of the sales to any other than itself. The car arrived in Lincoln, Nebraska, on Octo-

ber 10, 1918, and sometime between that date and October 16th, the car was unloaded and contents placed in the warehouse of Raymond Bros. Clark Company. The products were found to be in bad order when received and their condition was clearly shown by Commissioner's Exhibit No. 6 (Rec. 50). When the merchandise was received, directions were given by Raymond Bros. Clark Company to the shipping clerk to make distribution in accordance with the directions of Exhibit No. 2. The order intended for Basket Stores Company was not delivered to that company until November 15th. It does not appear that the Basket Stores Company made any demand for the shipment and the only explanation for the delay presented in the record is found in the testimony of Mr. Raymond. He describes quite clearly the labor difficulties due to the world's war (Rec. 78), and that they were required to change shipping clerks at that time because of the mental condition of the clerk (Rec. 80). Several weeks after the car was received, he observed this shipment had not been delivered and gave immediate orders for delivery. There was no intention upon his part to delay the delivery a single day.

There was no express contract between T. A. Snider Preserve Company and Raymond Bros. Clark Company, making provision for the distribution of the merchandise shipped in this car. The shipping bill, Exhibit "2" (Rec. 46), was received by Raymond Bros. Clark Company on October 7, 1918, and this was the first intimation this company had that the merchandise

for several customers was consigned to it. The next day Raymond Bros. Clark Company wrote the following letter to T. A. Snider Preserve Company (Exhibit 4, Rec. 49):

> "We have at hand your favor of the 7th inst. regarding distribution of car of your goods shipped to the City of Lincoln, and we are very much surprised to note in the same an order for the Basket Stores Company of this city. This concern is nothing but a retail store, and we cannot express our surprise that a concern like the T. A. Snider Preserve Company would sell an outfit like this direct. We ask that you kindly send us credit slip for the regular jobber's profit on this order, and oblige."

The T. A. Snider Preserve Company made no reply to this letter and under the date of October 22nd, 1918, the following letter was written by Raymond Bros. Clark Company to T. A. Snider Preserve Company (Exhibit 5, Rec. 50):

> "Gentlemen:
>
> On October 7th we wrote you regarding credit memorandum for the number of cases of your goods sold to the Basket Stores Company of this city, but up to the present time we have not received same, nor a reply from you.
>
> We also wish you would advise us of the amount we are to charge you for checking out, unloading and re-shipping other jobber's goods in this car shipped to us, and oblige."

The only reply to this letter was a demand for remittance under the date of November 14th.

On the 16th day of November, 1918, Raymond Bros. Clark Company wrote the T. A. Snider Preserve Company the following letter (Ex. 7, Rec. 51):

"Gentlemen:

Answering your letter of the 14th inst. regarding remittance on your account, this remittance will be made promptly when we receive a reply to our numerous letters sent to you regarding charge for checking out and handling this car and credit slip for the sales which were made direct to local retail Basket Stores of this city."

Under the date of November 18th, the following letter was received by Raymond Bros. Clark Company, from the T. A. Snider Preserve Company (Ex. 8, Rec. 51):

"Gentlemen:

We have your letter of the 10th inst. and note that you are holding up our invoice of $1,838.68 on account of some credits which you claim are due you. We do not believe that it is fair to hold up $1800.00 for those items which you claim are due you, which probably would not amount to more than $100.00 or $200.00, at the most and we would thank you to let us have remittance to cover our invoice and you might deduct those charges which you claim are due you, but you must give us invoices fully explaining why we should allow credits for those items.

We would thank you to let us have remittance by return mail and if we find that your deductions are in order we will gladly accept your check. We will give same our immediate attention upon receipt of your check and invoices covering your claims."

On November 29th, Raymond Bros. Clark Company sent a draft to T. A. Snider Preserve Company for

$1,590.42, making deductions in the amount of $27.58, on account of cash discount and the amount of $100.00 commission on Basket Store sales and something over $100.00 on other accounts that are not involved in this matter (Ex. 10, Rec. 52).

Under the date of November 3, 1908, Raymond Bros. Clark Company received the following letter from T. A. Snider Preserve Company (Ex. 9, Rec. 52):

> "Gentlemen:
>
> We are in receipt of your statement of November the 29th, together with check for $1590.42, which we return.
>
> We note that you have made a deduction of $110.68 for which you do not enclose a voucher.
>
> We wish you would kindly send us complete details on this deduction as we have no record of the same.
>
> Regarding your deduction of $100 commission on the order of the Basket Stores Company would say that you are entirely out of line on the same. Their president, Mr. Williams, called on us sometime ago after having been in Washington conferring with the Food Administration, they had a license for both their branches, and we felt as though we were compelled to honor their order.
>
> You also deduct $27.50 past discount to which you are not entitled as the terms on your order are '10 days from date of invoice.' There is $9.35 due you credited on our books, and we wish you would kindly make a deduction on this in sending us your corrected check."

Under the date of December 16, 1918, Raymond Bros. Clark Company wrote the following letter to T. A. Snider Preserve Company (Ex. 11, Rec. 53):

"Gentlemen:

We received yours of the 3rd inst. returning our remittance of November 29th and we are again enclosing the remittance with this letter, and per your letter, we inclose statement for the ledger charges we have against you, and which we deducted.

Regarding the $100.00 commission on the Basket Stores order will state that we certainly think we are entitled to this commission. Regardin the Basket Stores there is no question but what they have a food administration license because they do a large enough retain business to compel them to take out a license but they are simply retailers in every sense of the word. They do not operate a wholesale store and never have. They may have a warehouse from which they distribute goods to their various houses but they do not quote these goods to the trade and do not sell to other retailers. If we had had any inkling of any suspicion that you would take an order from these people and ship direct and bill goods to them direct, you never would have had a dollars worth of business from Raymond Bros. Clark Company, for we do not intend to buy from manufacturers who compete with us for the retail business of our own home town and if you do not feel inclined to give us the $100.00 on this car for our commission we ask that you kindly give us shipping instruction for all the goods of yours that we have in our house.

Regarding our deduction for this account, this was simply a matter of your own neglect. We wrote you immediately on receipt of your invoice regarding commission on Basket Stores goods and regarding the delivery and checking out charges on this car load but we received no reply from you. Had we received your prompt reply you would have received your money promptly."

On January 12, 1919, Mr. Davis, representing T. A. Snider Preserve Company, called upon Mr. Ray-

mond of the Raymond Bros. Clark Company in Lincoln, Nebraska, with a view of adjusting the $100.00 claimed on account of the sale to Basket Stores Company, but they were unable to agree upon a settlement. Mr. Davis appeared as a witness and is the only witness who was connected with the T. A. Snider Preserve Company. He testifies that he recognized the distinction between wholesale dealers and retail dealers and that it would be utterly impossible for a wholesaler to handle his product if he sold to one or more retailers at the same price he gave to the wholesaler (Rec. 36).

Mr. Raymond, of the Raymond Bros. Clark Company, told the representative of T. A. Snider Preserve Company, that the Basket Stores Company was engaged in the operation of retail grocery stores, and when he made this statement he says that he believed it to be true (Rec. 82).

Raymond Bros. Clark Company has made no purchases from T. A. Snider Preserve Company since the incident involved in this controversy. The testimony upon hearing was taken in January, 1920, more than fifteen months after the T. A. Snider Preserve Company products were received by respondent and at the time of the hearing the respondent yet had on hand and unsold a large portion of the shipment of merchandise (Rec. 86).

The president of the Basket Stores Company testified that in the operation of the retail business of the company they frequently sell merchandise for less than cost, taking into consideration the expense of doing business.

The Federal Trade Commission made its findings of fact as set forth in the record commencing on page 10. These findings of fact conform with the foregoing statement of facts and present findings of the separate acts constituting the single transaction between respondent and Snider Preserve Company.

The conclusion of the Federal Trade Commission was that the conduct of respondent as set forth in its findings of fact tended to and did unduly hinder competition between the Basket Stores Company and others similarly engaged in business, and that respondent intended to press the T. A. Snider Preserve Company to a selection of customers, in restraint of trade.

After making the findings of fact the Federal Trade Commission, on the 23rd day of February, 1921, entered the following order:

> "Ordered, that the respondent, Raymond Bros. Clark Co., its officers and agents, forever cease and desist from directly or indirectly—
>
> (1) Hindering or preventing any person, firm or corporation in or from the purchase of groceries, provisions, or the like commodities direct from the manufacturers or producers thereof, in interstate commerce, or attemptng so to do.
>
> (2) Hindering or preventing any manufacturer, producer, or dealer in groceries, provisions, and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.
>
> (3) Influencing or attempting to influence any manufacturer, producer or dealer in groceries, provisions, and the like commodities not to accept as a customer any firm or corporation which the manufacturer, producer, or dealer in the exercise of a free judgment, has or may desire to have such relationship."

BRIEF OF ARGUMENT.

I.

The evidence offered before the Federal Trade Commission does not support the findings of the Commission.

All of the findings of fact made by the Federal Trade Commission, with the exception of Nos. 3 and 4 are contrary to the evidence. The Basket Stores Company was not a competitor of respondent but was, in fact, engaged in the operation of seventy-two retail grocery stores (Rec. 58). The Federal Trade Commission correctly found that 90 per cent of its sales were made to consumers through retail stores (Rec. 11, Finding 2). Respondent was engaged exclusively as a wholesaler. A retail grocer is defined by the uncontradicted evidence to be one who generally sells direct to the consumer and the wholesaler is one whose general practice is to sell to retailers (Rec. 42). The Basket Stores Company was not licensed by the Government as a wholesale grocer but held a license issued by the United States Food Administration, because its volume of business as a retailer required it to have such a license. Respondent at no time requested T. A. Snider Preserve Company to refrain from selling its products to Basket Stores Company nor did it at any time threaten to withdraw its patronage if such sales were made. The evidence upon this subject is confined to the letters written by respondent (Ex. 4-5-6-7-11, Rec. 49-53) and the testimony of Davis (Rec.

26-33). The T. A. Snider Preserve Company had always maintained a sales policy of selling only to wholesalers (Rec. 40). The letters of respondent expressed only surprise at a change in sales policy and declared that respondent would not have made the purchases had it known of these changes.

II.

The complaint does not charge an unfair method of competition and is not of interest to the public.

The questions presented in petitioner's brief (10) are purely academic and find no foundation in the record. The complaint charges only a single controversy between the respondent and a single manufacturer (Rec. 2). It does not charge an *unfair method* of competition upon the part of respondent. The facts alleged in the complaint show clearly that the sole transaction complained of is not of interest to the public. There is no claim made that the respondent ever had any other similar controversy with any manufacturer or other person whomsoever, or that it has the slightest inclination to have any other such controversy. The evidence discloses that after respondent received a shipment of products from T. A. Snider Preserve Company, which it had ordered then for the first time it learned that T. A. Snider Preserve Company had shipped a large order to Basket Stores Company at the same price charged respondent. Such products were to be sold by Basket Stores Company in its seventeen (17) retail stores located in the City of Lincoln, in competetion with respondent's customers

and respondent then realized it could not resell the products it had purchased without making the sales at a loss.

Commissioners Exhibits 4-5-6-7 and 11 (Rec. 49-50-51-53).

A.

It is necessary that the proceedings before the Federal Trade Commission shall be of *interest to the public* and also that *unfair methods* of competition in commerce were employed, as comprehended by the Acts of Congress relating to interstate commerce and the interpretations thereof made by the courts.

Sec. 5 Federal Trade Commission Act.

Aluminum Company of America v. *Federal Trade Comm*., 284 Fed. 401.

Beech-Nut Packing Company v. *Federal Trade Commission*, 264 Fed. 885.

Federal Trade Commission v. *Gratz*, 258 Fed. 314.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Federal Trade Commission v. *Curtis Pub. Co.*, 43 Sup. Ct. Rep. 210 (213).

Kinney-Rome Company v. *Federal Trade Comm.*, 275 Fed. 665.

Standard Oil Company v. *Federal Trade Comm.*, 282 Fed. 81.

Mennen Company v. *Federal Trade Comm.*, 288 Fed. 665.

Winstead Hosiery Co. v. *Federal Trade Comm.*, 272 Fed. 957.

Sinclair Refining Co. v. *Federal Trade Comm.*, 276 Fed. 686.

New Jersey Asbestos Co. v. *Federal Trade Comm.*, 264 Fed. 509.

B.

A single act even though it may be subject to criticism as unfair or immoral without evidence of a *general practice* tending to establish an *unlawful method* in business, is of concern only to the individuals interested and is not a matter of *public interest* and does not constitute *"unfair methods of competetion."* Of such single acts the courts and not the Federal Trade Commission have jurisdiction.

Federal Trade Commission v. *Gratz*, 258 Fed. 314.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Royal Baking Powder Co. v. *Federal Trade Comm.* 281 Fed. 744.

III.

The order of the Federal Trade Commission is improvident and does not follow the complaint and is not based upon the allegations of the complaint.

The order to desist (Rec. 128) entered by the Federal Trade Commission does not follow the charge made in the complaint or the findings of fact. The complaint deals with a single transaction and the findings of fact made by the Commission relate to a single controversy between respondent and T. A. Snider Preserve Company over a single shipment of merchandise. The order to desist entered by the Commission commanded respondents to desist from all acts of a like character with the entire commercial world.

A.

The order to desist entered by the Federal Trade Commission is improvident and was rightfully annulled by the Circuit Court of Appeals, because it does not follow the complaint and is not based upon the findings of fact. The order to desist cannot be broader than the charges made in the complaint and the findings of fact.

Opinion of Circuit Court of Appeals in this case (Rec. 131) Sec. 5 of Federal Trade Commission Act.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Western Sugar Refining Co. v. *Federal Trade Comm.*, 275 Fed. 725.

IV.

The conclusion and order of Federal Trade Commission denies to respondent the right to select the merchandise it will purchase and the manufacturers from whom it shall make its purchases.

The only claim of violation of law, on the part of the respondent, is that it threatened to decline to make further purchases of merchandise from T. A. Snider Preserve Company if this company sold to retail dealers. Respondent claims the right to select the manufacturer from which it will purchase and insists that it had a right to make this selection by eliminating any manufacturer who sells to competitors of its customers at the same prices charged to wholesalers. If Basket Stores Company could acquire the Snider products for re-sale to consumers at the same price paid by respondent, it naturally follows that this respondent must then elect between re-selling

the products to independent dealers at actual cost or declining to purchase the products. The only wrong claimed to have been committed by respondent was that it declined to purchase merchandise from the T. A. Snider Preserve Company for reasons that were satisfactory and made the announcement of such reasons in plain English.

A.

A dealer in merchandise has the positive right to select the merchandise he may wish to purchase, and to select the persons from whom he may wish to make his purchases. This he may do for any reasons that seem sufficient to him or for no reason at all. He may announce his reason without fear of subjecting himself to liability of any kind. He has also the unquestioned right to discontinue dealing with any manufacturer for any reason or for no reason at all.

U. S. v. *Trans-Missouri Freight Assn.*, 166 U. S. 290.

U. S. v. *Colgate & Co.*, 250 U. S. 300.

Federal Trade Commission v. *Gratz*, 253 U. S. 421.

Jergens v. *Woodbury*, 271 Fed. 43.

Cudahy Packing Company v. *Frey & Sons*, 261 Fed. 65 (67).

Union Pacific Coal Company v. *U. S.*, 173 Pac. 737.

Deuber Watch Case Co. v. *Howard Watch & Clock Co.*, 66 Fed. 637 (644-645).

Western Sugar Refinery Company, et al. v. *Federal Trade Commission*, 275 Fed. 725.

Kinney-Rome Co. v. *Federal Trade Commission*, 275 Fed. 665.

Eastern States Retail Lumber Dealer's Assn. v. *U. S.*, 234 U. S. 600.

U. S. v. *American Tobacco Company*, 221 U. S. 106.

Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46-48.

Beech-Nut Packing Co. v. *Federal Trade Commission*, 264 Fed. 885.

Southern Hardware Jobbers Assn. v. *Federal Trade Commission*, 290 Fed. 773.

Mennen Company v. *Federal Trade Commission*, 288 Fed. 774.

Wholesale Grocers Assn. of El Paso, Texas, v. *Federal Trade Commission*, 277 Fed. 657.

Grenada Lumber Company v. *Mississippi*, 217 U. S. 433 (440).

Journal Publishing Co. v. *Tribune Co.*, 286 Fed. 112.

"B."

The Acts of Congress, together with the court constructions, furnish the standard for determining whether acts complained of constitute *unfair methods* in commerce. Where there is an entire absence of combination or agreement with other dealers and the effect of the Act is not to create a monopoly, a dealer possesses the absolute right to determine for himself whether he shall expend his money for any particular property or with any particular person.

Granada Lumber Co. v. *Mississippi*, 217 U. S. 433 (440).

Standard Oil Company v. *Federal Trade Comm.*, 282 Fed. 81 (87).

United States v. *Colgate & Co.*, 250 U. S. 300.

Southern Hardware Jobbers Assn. v. *Federal Trade Comm.*, 290 Fed. 773.
Wholesale Grocers Assn. of El Paso v. *Fed. Trade Comm.*, 277 Fed. 657.

V.

A dealer may urge a manufacturer to adopt a particular sales policy agreeable to his wishes and may advance such reasons as occur to him why the policy he has advocated should be adopted and may declare his unwillingness to trade with such manufacturer excepting upon his own terms.

U. S. v. *Southern Wholesale Grocers Assn.*, 207 Fed. 434 (443).
U. S. v. *Colgate & Co.*, 250 U. S. 300.

VI.

In order that coercion may exist in absence of physical force a person must be induced to do or perform some act because of the unlawful conduct of another under circumstances which deprive him of the exercise of his free will.

Black Law Dictionary.
State ex rel. Smith v. *Daniels*, 136 N. W. 584.
Adair v. *U. S.*, 208 U. S. 161.

ARGUMENT.

II.

The complaint does not charge an unfair method of competition and is not of interest to the public.

If we are to concede jurisdiction in the Federal Trade Commission over the matters charged in this complaint, we must at once degrade this great instrumentality of the Government It will then cease functioning as designed by Congress and become a referee of little controversies between merchants.

The Circuit Court of Appeals for the Second Circuit, in the case of *Winstead Hosiery Company* v. *Federal Trade Commission*, 272 Fed. 957, concisely and tersely states the powers of the Commission.

> "The Commission is not made a censor of commercial morals generally. Its authority is to inquire into unfair methods of competition in interstate and foreign commerce if so doing will be of interest to the public. And if such method of competition is prohibited by the Act, to issue an order requiring the person or corporation using it to cease and desist, from doing so. We have heretofore so understood the extent of the Commission's authority in *Federal Trade Commission* v. *Gratz*, 258 Fed. Rep. 314; affirmed 253 U. S. 421 and *New Jersey Asbestos Company* v. *Federal Trade Commission*, 264 Fed. Rep. 509.

It would undoubtedly be very nice and possibly in these times very much appreciated, if some individual or

commission had the right to say to every purchaser of merchandise in America, that he must pay for merchandise upon due date and that he must not deduct a cash discount unless in strict accord with terms of sale. It is barely possible that the amount sought to be exacted by Raymond Bros. Clark Company was excessive, but with this, surely the Federal Trade Commission has no concern and certainly Congress had no power to vest it with any authority concerning it.

Permit me to quote from *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686:

> "Neither section relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under Section 5 exists only where there are practices that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the *Kinney-Rome* case, *supra*, amount to an unfair method of competition.
>
> * * * * * * *
>
> "It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various—superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freight, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held

unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container. Petitioner said:

'Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us. If you wish to use them otherwise you may and must buy them. In kind that is nothing more than loaning a barrel, with a faucet in it.'

* * * * * * * *

"If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and power to judge what is too fast a practice for some and to compel others to slow up. In other words, to destroy all competition except that which is easy. We are of opinion that Congress did not intend to bestow any such power, and that it did not intend to do more than to eliminate the almost infinite variety of fraudulent practice from business and inter state commerce."

The authority of the Federal Trade Commission depends upon the power granted to it by the Act of Congress. An analysis of this act clearly shows that the Federal Trade Commission does not have jurisdiction to enter an order respecting the matters charged in this complaint. The Commission is authorized to proceed respecting "unfair methods of competition in commerce." It is not authorized to proceed against a single act where such act does not constitute a method and where in the

very nature of the circumstances, the act is not probable of repetition. The construction given by the Supreme Court of the United States, in the case of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, sustains this contention:

> "When proceeding under Section 5, it is essential, first, that, having reason to believe a person, partnership or corporation has used *an unfair method* of competition in commerce, the Commission shall conclude a proceeding 'in respect thereof would be to the interest of the public'; next, that it formulate and serve a complaint stating the charges *in that respect*" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint."

In the case of *Sinclair Refining Compay* v. *Federal Trade Commission, supra*, this question is directly determined and this rule is likewise declared in the case of *Kinney-Rome Co.* v. *Federal Trade Commission, supra*.

> "Neither section (Sec. 5, Federal Trade Commission Act; Sec. 3, Clayton Act) relied upon gives the Federal Trade Commission power to regulate trade generally. The jurisdiction under section 5 exists only where *there are practices* that amount to a fraud in regard to some public or private right; otherwise, they do not, in our opinion, as we said in the *Kinney-Rome case, supra*, amount to an unfair method of competition."

We contend that when the complaint is liberally construed it does not charge "unfair methods of competition." This question, in our case, is quite similar

to the question found in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421.

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled, by the court.
>
> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

It is essential that there shall be involved *practices* of a fraudulent or unlawful character in order that the Commission shall have jurisdiction of the subject matter. The uncontradicted evidence in this case shows with positive clearness, that the subject under examination comprised individual acts that cannot be said to constitute practices. The complaint charges a refusal on the part of respondent to deliver a consignment of goods intended for the Basket Stores Company within a reasonable time after receiving them. It further charges the refusal to

make this delivery, was because the manufacturer would not pay the respondent the sum of $100.00. Unquestionably the respondent was entitled to some compensation but the amount thereof might well be in dispute. Respondent was under no legal obligation to accept the burden of making delivery of the goods intended for the Basket Stores Company. Certainly it could not be required to make such delivery without compensation. It is not contended that the particular manufacturer ever made any other shipment of like character under like circumstances to respondent, nor is it claimed that any other manufacturer ever had a similar experience with respondent. It is not claimed that it is necessary for this particular manufacturer to continue making his shipments in this way, nor that such method constitutes the general business practice of the manufacturer. There is not even the slightest pretense that the business methods covered by the Commission's order were ever practiced or indulged in. The entire controversy is devoid of any particular method of business.

B.

When you analyze the complaint you find it deals entirely with a single transaction or a single controversy. You will also find that this transaction or this controversy is one of interest only to the Snider Preserve Company or Basket Stores Company and this respondent. The Federal Trade Commission Act seeks to prevent "unfair method in competition" and not an unfair act of a competitor. If the Federal Trade Commission is to have the

jurisdiction for which it contends the Commission should be enlarged so there would be at least one commissioner for every county in America. It should be provided with a constabulary much larger than our war time army. Just briefly analyze the facts. Complainant ordered a shipment of Snider Preserve Company products for re-sale to independent retail grocers. Up to that time this respondent believed the Snider Preserve Company had a sales force under which it sold only to wholesalers. This is also a conceded fact. This manufacturer, without notice to respondent, sold a large shipment to Basket Stores Company for re-sale, principally through its seventeen retail grocery stores in competition with respondent's customers. The respondent was surprised upon receiving information of this sale and advised the manufacturer that it would not have purchased the products had it known of this sale to the Basket Stores Company. Respondent also demanded the payment of $100.00 for its service in checking out and delivering the products shipped in the pool car. Snider Preserve Company objects to paying the amount of compensation demanded. Here we have but a single transaction by one small wholesale grocer in the interior of the country and the Federal Trade Commission proceeds to adjudge it to be an unfair method. The Federal Trade Commission finds the facts substantially as above outlined and then enters an order to the effect, that respondent must never again refuse to purchase the products of any manufacturer simply because such manufacturer elects to sell his products to chain store organizations. It would be

just as reasonable if the Federal Trade Commission would order respondent to hereafter refrain from declining to purchase canned goods unless the manufacturer would label them according to the wishes of the respondent. The fact is, the Federal Trade Commission is dealing entirely with a controversy which in its very nature amounts simply to an individual grievance.

In the case of *Federal Trade Commission* v. *Gratz*, 258 Fed. 314, we find the following:

> "We think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time the necessary amount of the American Manufacturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed."

Had respondent paid the invoice of the Snider Preserve Company without deducting its claim for $100 this case would not have been brought into existence. The real offending of respondent is found in its unwillingness to part with its money for merchandise that it could not possibly re-sell by reason of the manufacturers policy of distribution. It is probably true that respondent had a fairly pronounced conviction that it really had a fairly good title to its own money and had a right to claim the privilege of expending it or keeping it. Others may think that the excuse of respondent was a very poor one. Be that as it may the excuse was sufficiently satisfying to respondent.

This same question is referred to in the case of

Royal Baking Powder v. *Federal Trade Commission*, 281 Fed. Rep. 744 (745):

> "The commission in carrying into effect the provisions of the act is authorized to institute proceedings against those it has reason to believe are violating the terms of the statute. The proceedings which the commission is authorized to institute are not punitive, and no form of punishment is provided. It is not intended that compensation is to be made for any injuries which may have been suffered. The intent of the act is the prevention of injury to the general public. What the commission is created to deal with is, not acts of unfair competition, but the use of unfair methods of competition."

The statute contemplates that the particular "unfair method of competition in commerce" is of interest to the public. In this particular controversy the public can have no interest whatever. There is no claim that respondent used any effort to keep the manufacturer from selling the Basket Stores Company. At most the respondent simply advised the manufacturer that it would not purchase such products if sales were made to the Basket Stores Company. The respondent did not combine or collude with any other person whomsoever and there is no contention that respondent ever advised any other living mortal of its proposed position. There is not the slightest contention that any person in the world outside of the three parties above referred to had any knowledge of this controversy until the filing of the complaint by the Federal Trade Commission.

In the case of *Standard Oil Company* v. *Federal Trade Commission*, 282 Fed. 81 (87) we find a clear statement of the question under consideration:

> "Therefore in determining whether given acts amount to unfair methods of competition within the meaning of the Federal Trade Commission Act, or substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act in the words 'restraint of trade or commerce' and 'monopolize, or attempt to monopolize,' and by the courts in construing the Sherman Act with reference to acts 'which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade,' and 'restrict the common liberty to engage therein.' "

It surely cannot be contended that the refusal of respondent to purchase merchandise for re-sale to independent retail grocers from a manufacturer who is selling to the retail trade at the same price he charged the jobber will amount to a restraint of trade. Neither would tend to create a monopoly. The record in this case shows that the Basket Stores Company could not resell these products under the circumstances existing in its market.

In the case of *Wholesale Grocers Association of El Paso* v. *Federal Trade Commission*, 227 Fed. 657 you have the issue of a combination between wholesale grocers to interfere with sales by manufacturers to chain store organizations. In that case the court clearly recognized

the right of the individual jobber to refrain from purchasing the products of any manufacturer:

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

The above quotation is from the opinion by this court in the case of *Grenada Lumber Company* v. *Mississippi*, 217 U. S. 433. The opinion in the *Wholesale Grocers Association case* v. *Federal Trade Commission* quotes further from the Grenada case and then distinguishes the facts:

> "What the associated jobbers severally did went beyond each of them refraining altogether or to a less extent from buying from manufacturers whose products were sold directly to the Standard Grocery Company. They combined and co-operated with others to keep manufacturers willing to do so from selling their products directly to the Standard Grocery Company, and by that means to obstruct or prevent that company from competing as a wholesaler in territory sought to be appropriated by dealers not doing a combined wholesale and retail business."

Congress certainly never intended to give to the Federal Trade Commission the power to impress its opinion on the commerce of the country and give to that opinion the force of law. The Commission was clearly designed to prevent abuses in commerce by the employment of unfair methods injurious to the public and as defined by law.

Counsel for the Federal Trade Commission insists that the T. A. Snider Preserve Company should be permitted to select such medium of distribution as would meets its best judgment. Counsel's contention is that this manufacturer should have the right to distribute through wholesalers or through chain stores and should be perfectly free to select either or both. All we insist upon is that the wholesaler shall have equal freedom in the conduct of its business. If the manufacturer has a lawful right to select one of the above mediums for distribution and refrain from employing the other why has not the jobber or the chain store an equal right?

III.

The order of the Federal Trade Commission is improvident and does not follow the complaint and is not based upon the allegations of the complaint.

The order to desist in this case was entered by the Federal Trade Commission upon a charge that respondent violated Sec. 5 of the Federal Trade Commission Act. This complaint charged the respondent with certain transactions concerning a single item of business. The complaint and the findings of fact as well. relate only to a single item of business between respondent and T. A. Snider Preserve Company. Under all court constructions, the order to desist must not be broader than the unfair methods of competition charged in the complaint. This is the only fair construction that could be given to Sec. 5. In presenting our construction of this section of the act it is quite desirable to have before us a copy of Sec. 5:

> Sec. 5. Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using *any unfair method of competition in commerce*, and if it shall appear to the Commission that a proceeding by it in *respect thereof* would be to the interest of the public, it shall issue and serve upon such persons, partnership or corporation,. a comp[illegible]nt *stating its charges in that respect.*
>
> * * * If upon such hearing the Commission shall be of the opinion that the *method of competition in question* is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon the person, partnership or corporation an order requiring such person, partnership, or corporation, to cease and *desist from using such method of competition.*

The section requires that the complaint shall state "the charges in that respect." This expression refers to the *charges* which the *commission believed* to constitute *"unfair methods of competition."* We then observe that if upon hearing *"the method of competition in question"* is found to be unlawful, the order to desist shall be made. This finding by the Commission must be that *"the method of competition in question"* is found to be unlawful. Clearly, the Commission could not find that some other method than that which was charged in the complaint was unlawful, but the Commission is restricted to a finding that the *"method of competition in question"* is unlawful. This section of the Federal Trade Commission Act authorized the Commission to order a cessation and desisting *"from using such methods of competition."* The authority to order a desisting refers specifically to

the "*methods of competition*" and were "*in question*" that is, the methods of competition *charged* to constitute "unfair methods of competition in commerce," in the complaint.

This question was clearly determined by the Supreme Court of the United States in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421:

> "When proceeding under Section 5, it is essential, first, that, having reason to believe a person, partnership or corporation has used an unfair method of competition in commerce, the Commission shall conclude a proceeding "*in respect thereof would be to the interest of the public*"; next, that it formulate and serve a complaint stating the charges "*in that respect*" and give opportunity to the accused to show why an order should not issue directing him to "cease and desist *from the violation of the law so charged* in said complaint." If after a hearing, the Commission shall deem "the method of competition *in question*" is prohibited by this act, "it shall issue an order requiring the accused to cease and desist from using *such method of competition.*"

The Circuit Court of Appeals for the Ninth Circuit, in the case of *Western Sugar Refining Company et al.* v. *Federal Trade Commission*, 275 Fed. 725, refers to the Gratz case upon this question, as follows:

> "In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (427), the Supreme Court, referring to the proceedings and order under Section 5 of the Federal Trade Commission Act, said:
>
> > 'Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.' "

"It follows that the order of the Commission must follow the charge in the complaint and that the charge in the complaint must be supported by evidence."

In this case the complaint charges specific acts. The complaint charges a failure to deliver merchandise to Basket Stores Company and threats to coerce Snider Preserve Company to refrain from selling to Basket Stores Company. The order of the Commission does not pretend to follow the complaint. The order (Rec. 144) requires Raymond Bros. Clark Company to cease and desist from:

1. Hindering or preventing any person, firm or corporation in or from the purchase of merchandise, provisions or like commodities direct from the manufacturer or producer thereof, in interstate commerce or attempting so to do.
2. Hindering or preventing any manufacturer, producer or dealer in groceries, provisions and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.
3. Influencing or attempting to influence any manufacturer, producer or dealer in groceries, provisions and the like commodities, not to accept as a customer, any firm or corporation that the manufacturer, producer or dealer, in the exercise of a free judgment, has or may have such relationship.

The orders of the Federal Trade Commission proceed along the lines of a complaint against *methods* in commerce while the complaint itself charges *a single act*

to be unfair. The complaint charges that the purpose of Raymond Bros. Clark Company was to cut off supplies from the Basket Stores Company and to stifle competition between it and the Basket Stores Company and to interfere with the Basket Stores Company and Snider Preserve Company in trading with each other.

We believe it requires only a reading of the order and a reading of paragraph 4 of the complaint to dispose of this proposition.

IV.

The conclusion and order of Federal Trade Commission denies to respondent the right to select the merchandise it will purchase and the manufacturers from whom it shall make its purchases.

This entire controversy centers around the belief of respondent that it had a perfect right to decline to purchase the products of any manufacturer for any reason that seemed good to it. Respondent apparently also indulged the belief that it had the lawful right, when declining to purchase the products of any manufacturer, to honestly and candidly express the reasons for such refusal. It appears, without conflict, that the T. A. Snider Preserve Company was the manufacturer of certain products which it had uniformly been selling exclusively through wholesalers. Raymond Bros. Clark Company engaged in carrying on the business of a wholesale grocer had been purchasing these products and on this particular occasion gave to a representative of the T. A. Snider Preserve Company an order for a fairly large sized shipment. The next chapter in the controversy opens with the indigna-

tion of Raymond Bros. Clark Company upon finding that T. A. Snider Preserve Company had changed its sales policy without notice. It appears that at the same time the traveling representative of T. A. Snider Preserve Company obtained the order from respondent he also obtained an order for a fairly large shipment from Basket Stores Company. It is conceded by all parties that Raymond Bros. Clark Company was selling its merchandise to a large extent to the independent grocers in Lincoln. The Basket Stores Company maintained seventeen retail stores in Lincoln for sale of its merchandise direct to the consumer. The respondent purchased these products from T. A. Snider Preserve Company with a view of re-selling them to its customers and particularly the independent retail stores in Lincoln.

Counsel for the Federal Trade Commission opens his statement of facts with "this is one of many controversies which have reached the Commission and the courts arising out of the developments in the business world which appear to manifest an economic tendency toward a more direct system of distributing the products of factory and farm to the consumers thereof." Counsel then makes this very broad and pertinent admission:

> "If a chain of retail stores can purchase its supplies direct from manufacturers and producers in the same quantities and upon the same terms as those made to jobbers, obviously such stores can sell commodities to the purchasing and consuming public at prices below those made by others through

which commodities are distributed from the manufacturer, to wholesaler, to retailer."

We are mindful of the settled conviction of the Federal Trade Commission that the philosophy for distribution of food stuffs sought to be promoted is sound and in the interest of the general public. As a matter of fact, the soundness of this position upon this great economic question is of very little materiality to a correct solution of this case. At the same time we cannot permit the presentation of such a theory to pass unchallenged. It is quite apparent that no one has considered the effect upon consumers of the establishment of a system whereby the sales to consumers will be controlled by a single combination or several combinations. It is quite apparent that no one has considered that there are in infinite number products of the factory and the farm that cannot be economically handled from the producer to the consumer or to the consumer through a single agency. It always will be necessary to maintain some system whereby there shall be collected by some warehousing agency, many of the commodities that are necessary for the retailer and yet that the demands of his trade will not permit direct shipment from the producer. True, this can be handed by the warehousing facilities, of large combinations, controlling many retail stores. You change from the old time system of distribution advocated by such expressions as we have quoted from counsel for Federal Trade Commission and you step from a system of independent merchandising to a system of monoply. Of course, it is possible that the chain stores, after extinguishing the in-

dependent store, would establish for itself a code of morals that would permit it only to take a living toll notwithstanding it had no competetion. We are rather inclined to believe that a little serious thought upon this subject, with the real picture of correct merchandising in hand, would not be out of place. As we view it, it is but one step from independent merchandising to monopoly and perhaps we may then expect legislation controlling prices instead of legislation promoting free competition.

The jobber has no right to prevent the chain stores from purchasing from any manufacturer wishing to sell to them and the manufacturer must be and is perfectly free to select his own customer. Counsel for the commission appears to us to be occupying a position that is illogical. He asserts "the manufacturer should be free to select either of these methods of distribution or employ both." Just a few sentences before this one, we find the positive assertion by him that, "obviously such stores (chain stores) can sell commodities to the purchasing and consuming public at prices below those made by others through which commodities are distributed from manufacturer, to wholesaler, to retailer." It is self evident, when we consider this truthful statement, that the wholesaler could not expect to sell products to an independent retailer engaged in competition with the chain stores on products purchased direct from manufacturers. We grant the contention of the Federal Trade Commission that the manufacturer should be free to select its method of distribution, but we exact the same privilege for ourselves.

We contend that respondent had a perfect right to refuse to purchase T. A. Snider Preserve Company products for any reason that appeared to be good to it. This reason might indeed be a very foolish one and still respondent could keep its money until it saw fit to spend it for the property of someone else willing to sell. The order to desist entered by the Federal Trade Commission is equivalent to a command, that respondent must not hereafter refuse to purchase from any manufacturer who sells direct to the retail trade. How can respondent obey this command excepting by purchasing from such a manufacturer, although it has concluded that it did not wish to do so. We assume respondent might refuse to purchase Snider catsup if it concluded that it would rather handle Campbell catsup. We are, however, solemnly told that we must not refuse to purchase Sniders catsup, if our reasons for not wishing to purchase that product is based upon the methods of business carried on by Snider. We have always assumed that a man might keep his money until he concluded to spend it for something that he wished to purchase. When he decided to part with his money he might be acting upon a very foolish reason. Certainly we have not degenerated to that point that the Government through one of its greatest departments is going to pass upon the soundness or unsoundness or the fairness or unfairness of the reason upon which a purchaser will act. The Federal Trade Commission insists that Snider Preserve Company shall have the right to select the Basket Stores Company as a customer if it wants to.

We believe there should be just as emphatic insistence that the respondent in this case should be permitted to select the manufacturers from which it will purchase.

We have felt that the question involved in this case is really not a fair subject for debate. It seems clear to us that Congress never intended, if indeed it could do so, to take from any man the natural right to deal or refrain from dealing as he might wish. We know of no qualification to this statement other than that he shall not combine or conspire with others respecting the subject. It has been frequently held that the dealer has the unquestioned right to cease dealing with a wholesaler or a manufacturer for any reason that seems good to himself. This has always been treated by the courts as a natural right that was never intended to be taken away. In the case of *Eastern States Retail Lumber Dealers' Association* v. *U. S.*, 234 U. S. 600 the court says:

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 54 L. Ed. 826, 30 Sup. Ct. Rep. 535. 'When the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited

> or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.' "

There is no contention on the part of the Federal Trade Commission that Raymond Bros. Clark Company acted upon or pursuant to any agreement or combination. The respondent simply exercised its individual freedom to refrain from purchasing Snider Preserve Company products because it did not like its sales policy. Suppose that respondent had suddenly changed its policy and advertised that it would sell merchandise to all consumers in the City of Lincoln and at the same price that it would sell to retailers, it is barely possible that there would be found at least one retail merchant in the city of Lincoln who would say to himself that we cannot pay to Raymond Bros. Clark Company the same price our customers pay and yet expect to sell. The Federal Trade Commission would undoubtedly insist that Raymond Bros. Clark Company shall be privileged to sell to consumers as well as to retailers. No one can gainsay that this privilege should be accorded to that company. It would seem, however, decidedly unfair if the Federal Trade Commission should put some little retail grocer to a large expense, because he had refused to continue to purchase from Raymond Bros. Clark Company after its change in sales policy.

The right of the individual dealer to select his own customer is fully discussed in *Western Sugar Refining Company et al.* v. *Federal Trade Commission*, 275 Fed. 765:

"It is the settled law that the individual dealer may select his own customers for reasons sufficient to himself, and he may refuse to deal with a proposed customer who he thinks is acting unfairly and is trying to undermine his trade. *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 614. But, as was said by the Supreme Court in *Grenada Lumber Company* v. *Mississippi*, 217 U. S. 433, 440:

> When the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another cause is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.

The evidence before the court was the evidence before the Commission.*

> The Western Sugar Refining Company and the California and Hawaiian Sugar Refining Company sold their sugar to the Los Angeles jobbers and they, in turn, sold or would sell to the Los Angeles Grocery Company as to a retail dealer, but the refiners would not sell direct to Los Angeles Grocery Company at the usual rates and terms to jobbers for the reason, as stated by them, that they did not regard the Los Angeles Grocery Company as a wholesale dealer or jobber. There is no testimony in the record that this course of action on the part of the two sugar refiners arose from any actual understanding or agreement between them or with the Los Angeles jobbers. The testimony proves that it was a concurrence of opinion as to the classification to be given to the Los

> Angeles Grocery Company, but we do not find anything more in the testimony. This classification appears from the testimony to have been erroneous, but as long as it was the individual opinion and action of the refiners, it could not be made the basis of a finding of conspiracy or combination between the two refiners, or between them and the jobbers, or between them and the brokers.
>
> The difficulty has long been recognized of drawing a definite line between the innocent act of an individual and the same act made unlawful by reason of its being the joint or combined act of two or more, but whenever this question arises there must be some legal evidence to establish the unlawful combination or conspiracy, or facts from which that inference may be legally drawn, or the charge must fail. We do not find such evidence in this record with respect to the two sugar refiners."

It is frequently difficult to draw the line between acts of the individual which may be innocent and which may be unlawful. There may be a concert of action by many individuals that will sustain the charge of a combination in restraint of trade and yet it may be difficult to point out the existence of a precise contract or understanding. Such a contract or combination may, of course, be implied. In this case, however, there is not even the suggestion of a combination by respondent with any person whomsoever. It is not even suggested that respondent ever informed any other person, company or corporation of its proposed action. In the "pool car" in which the particular products were shipped to the respondent and the Basket Stores Company we find shipments to some half a dozen other wholesale deal-

ers. There is not even a suggestion that respondent mentioned its course or proposed course to any of those wholesalers. It seems clear to us that unless there has been a violation of the Sherman Act or the Clayton Act that the right of the individual to select his customers remains secure. In the case of *Great Atlantic & Pacific Tea Company* v. *Cream of Wheat Company*, 227 Fed. 46, the following statement is rather pertinent:

> "Before the Sherman Act, it was the law that a trader might reject the offer of a proposed buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial or social. That was purely his own affair, with which nobody else had any concern. *Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act has changed the law* in this particular. We have not reached the stage where the selection of a trader's customer is to be made for him by the Government."

This question is also discussed in the recent case of the *United States* v. *Colgate & Company*, 250 U. S. 300:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage in trade and commerce—in a word, to preserve the right of freedom to the trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to

> exercise his own independent discretion as to parties with whom he will deal. And of course he may announce in advance the circumstances under which he will refuse to sell."

The right of the trader to exercise the privilege of selecting customers was recognized in the case of *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, where the distinction is made between a private business and the business of a common carrier:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, and may sell to whom he pleases."

In the case of *Kinney-Rome Company* v. *Federal Trade Commission*, this principle is recognized and followed:

> "(4) In determining whether there was used 'an unfair method of competition' it must always be kept in mind that the thing complained of was done in the merchant's business through an arrangement with him. What then may the merchant do? In *United States* v. *Freight Ass'n*, 166 U. S. 290, the Supreme Court said, at page 320:
>
> 'The trader or manufacturer * * * carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction.'
>
> That case has been repeatedly approved, and a portion of that language was used in *United States* v. *Colgate*, 250 U. S. at page 307."

It seems hardly necessary to direct attention to the numerous other cases announcing this principle but as we cite them in our brief we will present short quotations from some of them:

Jergens Co. v. *Woodbury, Inc.*, 271 Fed. 43 (44):

> "The charge made in the proposed answer, as I view it, falls within the principle laid down in *Federal Trade Commission* v. *Gratz* and *United States* v. *Colgate & Co.*, to the effect that a trader or manufacturer may, in the absence of an intent to create or maintain a monopoly, freely exercise his own discretion as to parties with whom he will deal, and that he may announce in advan e the circumstances under which he will refuse to sell."

Federal Trade Commission v. *Gratz*, 253 U. S. 421:

> "All questions of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

Cudahy Packing Company v. *Frey & Son*, 261 Fed. 65 (67):

> "Since the defendant, under the Colgate case, merely exercise the right reserved by the Clayton Act to dealers of 'selecting their own customers in *bona fide* transactions and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price."

Union Pacific Coal Co. v. *U. S.*, (1909) 173 Fed. 737:

> "There was no law which forbade the coal company to prescribe the terms on which it would sell its product to Sharp, or to any other purchaser. There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the Act of July 2 1890, which deprived the coal company of any of these common rights of the owners and vendors of merchandise, and if it did not combine with some other person or persons so to do, its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not the violation of the Sherman Anti-trust Act charged in the indictment."

Deuber Watch-Case Co. v. *E. Howard Watch & Clock Co.*, 66 Fed. 637 at 644 and 645:

> "An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern with which governmental paternalism has not as yet sought to interfere, except when the property he owns is 'devoted to a use in which the public has an interest;' and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity."

The respondent is engaged in an entirely private business seeking to sell merchandise to independent retail grocers. As conceded by counsel for the Federal Trade Commission, it could not hope to sell the products of Snider Preserve Company to retail grocers, if the Snider Preserve Company was competing for that business and offering to sell to retailers at wholesale price. In the case of the *Mennen Company* v. *Federal Trade Commission*, 288 Fed. 774, this question is applied to conditions not seriously dissimilar to the conditions confronting us:

> "What the Mennen Company has done, was to allow to 'wholesalers' who purchased a fixed quantity of their products a certain rate of discounts while to the 'retailers' who purchased the same quantities it denied the discount rates allowed to the 'wholesalers.' This does not indicate any purpose on the part of the Mennen Company to create or maintain a monopoly. The company is engaged in an entirely private business and it has a right freely to exercise its own independent discretion as to whether it will sell to 'wholesalers' only or whether it will sell to both 'wholesalers' and 'retailers,' and if it decides to sell to both it has a right to determine whether or not it will sell to the 'retailers' on the same terms it sells to the 'wholesalers.' It may announce in advance the circumstances, that is the terms, under which it will sell or refuse to sell."

We might well content ourselves with the soundness of our position upon the legal question just presented. The act of the respondent did not violate the law in any particular. The respondent simply declared its surprise at the change in sales policy of the T. A. Snider Preserve Company and announced that if it had known

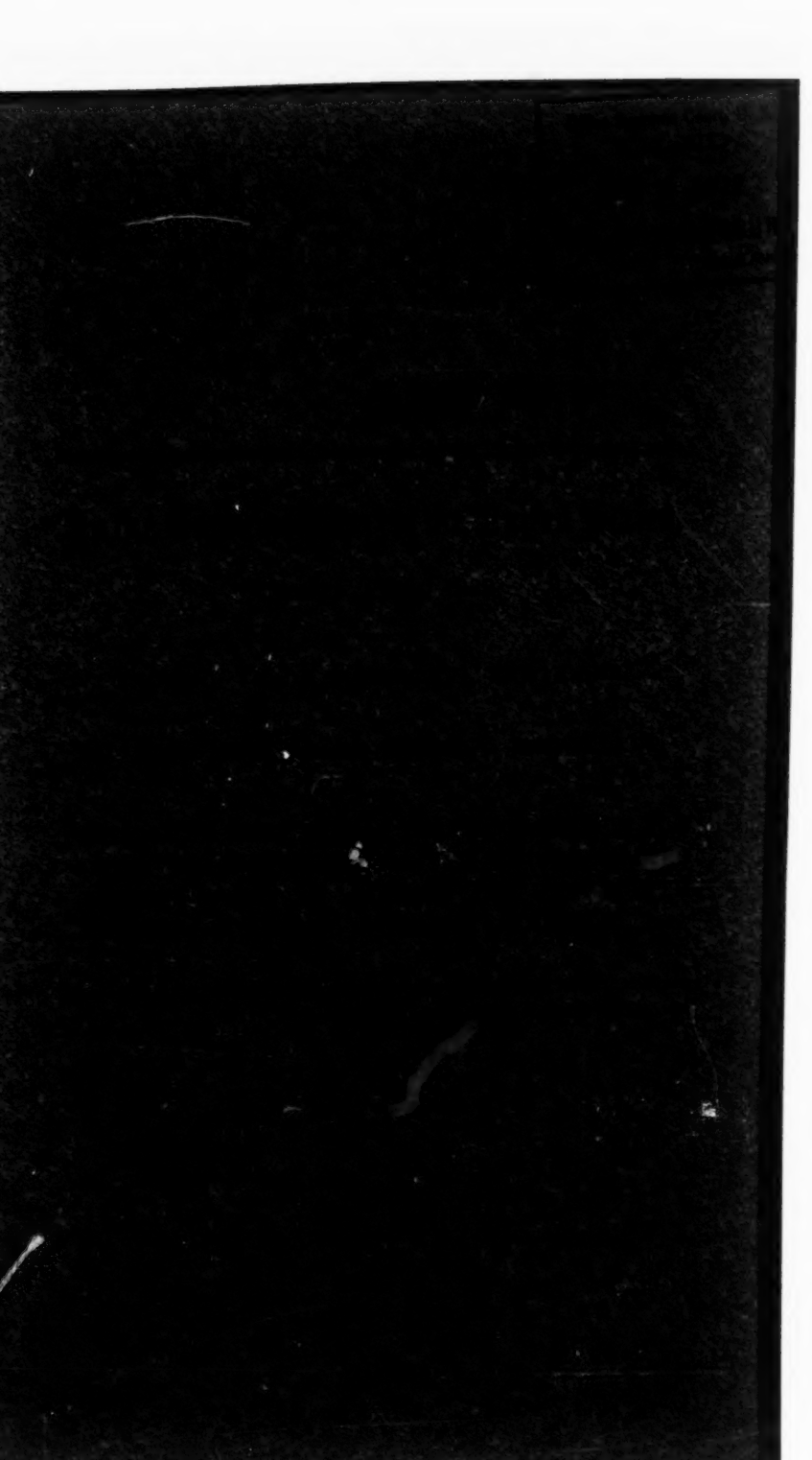
of such a change that it would not have purchased the merchandise in question. In other words, respondent simply exercised its right to select the manufacturer from which it would purchase and had the temerity to announce its reason publicly. If respondent had the lawful right to decline to purchase the T. A. Snider Preserve Company products for this reason, and if it also had the right to announce the reason there is no necessity of attempting to find a further justification.

In *Journal of Commerce Publishing Company* v. *Tribune Company*, 286 Fed. 112, the following quotation is rather pertinent:

> "When one's acts are wholly within the law, he needs no additional justification in court. But the record in this cause exhibits a strong moral ground for the Tribune Company to insist upon its legal rights with the carriers. During long years the Tribune Company devoted great attention and spent large sums in building up a carrier system through which its papers could promptly and reliably be distributed to subscribers. By means of premiums and various advertising methods it secured new subscribers and furnished their names and addresses to the nearest Tribune carrier. In territory where the business was not large enough to pay a carrier for delivering the papers, it paid the carrier until the difference between the established buying and selling prices of the papers would afford satisfactory pay. For these and many other similar expenditures of effort and money, each carrier, through owning his own 'route' and buying outright from day to day his copies of the paper, recognized that the Tribune Company had at least a moral right to a voice in controlling the methods and personnel of the carriers."

We believe this entire controversy is free from public interest and that the petition should be dismissed.

EMMET TINLEY,
W. E. MITCHELL,
D. L. ROSS,
EDWIN D. MITCHELL,
Counsel for Raymond Bros. Clark Company, Respondent.



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AUTHORITIES CITED.

ing any manufacturer or producer of, or dealer in such commodities, in the course of such commerce, in or from the selection of customers, or influencing or attempting to influence any manufacturer, producer of, or dealer in such commodities, in the course of such commerce, not to accept as a customer anyone whom such manufacturer, producer, or dealer, in the exercise of a free judgment, has or may desire to have such relationship.

THE FACTS.

The respondent, a Nebraska corporation, is engaged in the business generally known as that of a wholesale grocer, with principal place of business at Lincoln, Nebraska. On October 28, 1919, a complaint was issued by the Federal Trade Commission, under and by virtue of the provisions of section 5 of the act of Congress approved September 26, 1914, known as the Federal Trade Commission act (28 Stat. 717, c. 311), in which complaint it was charged that respondent had hindered or attempted to prevent the Basket Stores Co., a competitor, in or from the purchase of groceries and like commodities direct from manufacturers or producers, and had hindered or attempted to prevent the T. A. Snider Preserve Co. from selling and delivering food products manufactured by it to said Basket Stores Co., or from selecting or accepting said Basket Stores Co. as a customer in the sale and distribution of its products. After service of the complaint respondent made answer thereto in writing, whereupon testimony of witnesses was taken, both

in support of the charges stated in the complaint and in opposition thereto, and the matter was submitted to the commission on the complaint, answer, testimony, briefs, and oral argument; and thereafter, on February 23, 1921, the commission, being of the opinion that the methods of competition in question were prohibited by the act, made its report in writing in which it stated its findings as to the facts, and issued and served on respondent an order requiring it to cease and desist from such methods of competition.

The respondent and the Basket Stores Co. each did a volume of business aggregating $2,500,000 in the year 1919. At the time of and before the issuance of said complaint the Basket Stores Co. had its principal place of business at Omaha, Neb., and maintained a warehouse at Lincoln, Neb., and had 72 retail stores at Omaha, Lincoln, and at other points in the States of Nebraska and Iowa. It purchased substantially all of its supplies direct from manufacturers in States other than Iowa in carload lots or in quantities equivalent to those in which wholesale grocers generally purchased their supplies. Of the commodities distributed by the Basket Stores Co. approximately 10 per cent of the total were sold to retail stores outside its own organization and to restaurants and hotels in wholesale quantities, and approximately 90 per cent of the total of such commodities were sold to the consuming public through the retail stores operated by it.

On October 4, 1918, there was shipped from Marion, Indiana, by the T. A. Snider Preserve Co., a carload of food products, orders for which had been taken

from six customers located at Lincoln, Nebr., and adjacent points. That part of the shipment sold to the Basket Stores Co. weighed only 16,251 pounds, or less than the minimum carload, and by combining these goods with those purchased by the five other customers the aggregate weight was over 61,000 pounds, or more than a minimum carload, which gave the consignees the benefit of the carload freight rate, which is substantially less than the rate would have been for a shipment of less than a carload. As was the custom in such cases, the goods were shipped in what is known as a "pool" car, which was consigned to respondent, and the invoice of the contents of the car was sent to respondent, showing the items purchased by each of the six customers. Of the six consignees, five were members of the Iowa-Nebraska Wholesale Grocers' Association, and about whose right to purchase in wholesale quantities direct from manufacturers respondent made no contention, but when it ascertained that a portion of the goods, or more than 26 per cent of the total weight, was consigned to the Basket Stores Co., it immediately protested to the Snider Company in a letter dated October 8, 1918, and expressed surprise that the goods had been sold to the Basket Stores Co. direct, and the claim was made that the Basket Stores Co. was nothing but a retail store, and a demand was made for a credit slip for the regular jobber's profit on the goods sold to the Basket Stores Co. No response was made by the Snider Company to this demand, and on October 22 two letters were written to the Snider Company by

respondent requesting advice as to the amount it should charge for unloading, checking out, and reshipping the contents of the car, and advising the Snider Company of the distribution of the contents of the car, some of which had been received in bad order and was turned back to the railroad company.

The car reached Lincoln, Nebr., on October 10, 1918, and was "spotted" at the warehouse of the respondent the next day, and some time between October 11 and October 16 the car was unloaded and that portion of the goods going to Beatrice and Nebraska City had been reshipped to these points and the goods which had arrived in bad order were turned back to the railroad company, but the Basket Stores Co. was not notified of the arrival of the goods until November 15 following, or 35 days after the car had been "spotted." The goods consigned to the Basket Stores Co. remained all this time in the warehouse of respondent, although the Basket Stores Co. was greatly in need of the goods to supply its trade. In remitting to the Snider Company for the goods purchased by it, respondent deducted from the amount of the bill $100 which it designated as "Commission on Basket Stores." A controversy arose over this charge between the Snider Company and the respondent, and on December 16 following respondent wrote to Snider Company again, in which letter it sought to justify its action in deducting the $100, and reiterated its claim that the Basket Stores Co. did only a retail business and did not operate a wholesale store, and the statement was made that

if respondent had known that the Snider Company had accepted an order from the Basket Stores Co. direct, the Snider Company would never have had a dollar's worth of business from respondent, and that, unless its claim for $100 commission from the Basket Stores Co. shipment were allowed, it desired the Snider Company to give it shipping instructions for all Snider Company products in the possession of respondent. In January, 1919, Mr. T. A. Davis, sales manager for the Snider Company, called on respondent to end, if possible, the controversy which had arisen over the $100 commission, but did not succeed.

THE QUESTIONS PRESENTED.

1. Whether or not the practices of respondent, as set out herein (ante, pp. 2–6), constitute an unfair method of competition within the intent and meaning of the provisions of section 5 of the Federal Trade Commission act (38 Stat. 717, c. 311).

2. Whether a trader, by threats of withdrawal of patronage or other means, acting alone and not in combination with others, may induce, coerce, or attempt to induce or coerce, a manufacturer or producer of groceries and related commodities to refuse to sell its products to a competitor of such trader, thereby hindering or preventing such competitor in or from the purchase of supplies necessary for the conduct of its business.

3. Whether a trader, by threats of withdrawal of patronage, or by other means, acting alone and not

in combination with others, may induce, coerce, or attempt to induce or coerce, a manufacturer or producer of or dealer in groceries and related products not to accept as a customer a competitor of such trader, which competitor such manufacturer, producer, or dealer, in the exercise of a free judgment, has or may desire to have such relationship.

REASONS FOR THE ALLOWANCE OF THE WRIT.

Speaking broadly, this case is one of many arising out of the effort to establish a more direct system of distributing the products of factory and farm to the consumers thereof. The movement has manifested itself in the establishment of cooperative organizations among dealers for purchasing directly from manufacturers, cooperative selling organizations among farmers, mail-order houses, chains of retail stores, etc. To the extent to which the movement is successful it will diminish the profits of those through whose hands the commodities have heretofore passed, and it has, therefore, from the first met the organized and individual opposition of established dealers, retail and wholesale. (*Eastern States Retail Lumber Dealers' Association* v. *U. S.*, 234 U. S. 600, *National Harness Manufacturers' Association* v. *Federal Trade Commission*, 268 Fed. 705; *Wholesale Grocers' Assn. of El Paso, Texas, et al.* v. *Federal Trade Commission*, 277 Fed. 657.)

The instant case involves the efforts of a corporation operating a chain of retail grocery stores

to purchase in wholesale quantities directly from manufacturers.

If a chain of retail stores should be able to get its supplies direct from manufacturers and producers in the same quantities and upon the same terms as those made to jobbers, obviously such stores could sell commodities to the purchasing and consuming public at prices below those made by stores through which commodities are distributed from manufacturer, to wholesaler, to retailer; and the public is entitled to any benefits which may be derived from a direct method of distribution by manufacturers or producers to retailers; and if a jobber should prevent a manufacturer from distributing its products direct to the retailer by threats of the withdrawal of patronage or by other unfair means, it is submitted that such practices constitute an unfair method of competition within the intent and meaning of the provisions of section 5 of the Federal trade act. A manufacturer should be free to select either of these methods of distribution, or to employ both. The considerations which govern his decision in this matter will presumably be the relative profitableness of these different methods, and this, in turn, is affected chiefly by the volume of business obtainable by using one or the other, or employing both. It may be argued by jobbers that the most economical method of distribution is through the wholesaler and the retailer to the consumer, but the assumptions lying back of this

theory are not always sound. The actual facts are that this depends almost entirely upon a quantity position. It may be to the interest of the manufacturer in certain cases to sell through the wholesaler because of the size of the wholesaler's orders, because the sales effort required to sell a given volume of goods through the wholesaler is much less than that which must be made to sell the same volume direct to retailers, owing solely to the fact that the usual wholesale order is much larger than the usual order given by a retailer; but with the development of large-scale retailing, particularly the mail-order house, chain stores, and cooperative retail associations the situation has changed, and the Basket Stores Co. was able to and did purchase its supplies in quantities fully as large as those in which wholesalers generally purchased their supplies, and as a result the Basket Stores Co., in the retail branch of its business, absorbed the profit formerly obtained by the wholesaler and was able to pass it along to the consuming public.

The court below based its judgment wholly upon the principle that the respondent had a positive and lawful right to select any particular merchandise which it wishes to purchase and to select any person from whom it might wish to make its purchases and discontinue dealing with any manufacturer, but the gist of the charges stated in the complaint, and the particular practice from which respondent was required to cease and desist, was its

interference with a competitor by cutting off its source of supply, by inducing or attempting to coerce a manufacturer to cease selling its product to such competitor; the order issued by the commission in no way directed respondent to purchase supplies from any particular manufacturer, but merely requires it to quit interfering with trade relations which one of respondent's competitors had established with a given manufacturer, which relations were satisfactory to both parties.

The court below apparently was influenced in reaching its conclusion by the fact that respondent was acting alone and not in combination with others, possibly confusing the provisions of section 5 of the commission act with the provisions of the Sherman Act, which prohibit combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, and overlooked the fact that the commission act makes unlawful all unfair methods of competition in commerce, and directs the commission to prevent *individuals* from using such methods.

The judgment of the court below is, therefore, in direct conflict with the recent decisions of this court in which it was held in effect that all practices which are offensive or which have a dangerous tendency, unduly to hinder competition, are unlawful, and may be prevented by a proceeding under section 5 of the commission act.

It is important that it be determined as early as practicable whether methods of the character here

used may lawfully be employed to prevent modification in the present system of distribution.

Wherefore it is respectfully submitted that the petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Eighth Circuit be granted.

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Solicitor General.
W. H. FULLER,
Chief Counsel, Federal Trade Commission.

BRIEF.

The facts found by the commission constitute an unfair method of competition.

The substantive law of section 5 of the Federal Trade Commission act is found in the following paragraph:

> That unfair methods of competition in commerce are hereby declared unlawful.

Free and fair competition is the affirmative and positive principle upon which our industrial and, in turn, our social system is based. The competitive system is justified upon the postulate contained within it that, as a result of the operation of free and fair competition, there results to the unit the highest possible degree of reasonable return and to the public the best in quality and service at the lowest price. And so the law in its present state places monopoly at the opposite pole to free and fair competition. But seeing the necessity for prevention of monopoly as well as its punishment attempt at monopoly was also included in the Sherman Act. Looking still further in the field of prevention, it appeared that the way from free and fair competition toward monopoly led through restraint of trade, which was also prohibited by the Sherman Act if accomplished through the medium of contract, combination, or conspiracy. But experience proved that, either because of the limited condemnation of methods by the Sher-

man Act or because it did not go far enough into the field to protect free and fair competition in the initial stages of departure from these principles, the law had not been effective, and Congress took two steps forward by the trade commission act. It threw off all limitations as to methods and amplified its definition of the unlawful departure from free and fair competition. Monopoly and restraint of trade are still under the legal ban, but the scope of preventive measures has now been advanced in the anticipatory field to check the movement away from free and fair competition at the stage of unfair competition. The causes impelling this advance are summarized in the dissenting opinion of Mr. Justice Brandeis in the *Gratz* case.

This court outlined the meaning of the phrase "unfair methods of competition" in the *Gratz* case, as follows:

> The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or *as against public policy because of their dangerous tendency unduly to hinder competition* or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

Again in *Federal Trade Commission* v. *Beech-Nut Packing Company* (42 Sup. Ct. Rep. 150) this court held the "Beech-Nut system of merchandising" to be an unfair method of competition because of its effect to restrict competition; subsequently, in *Federal Trade Commission* v. *Winsted Hosiery Company* (42 Sup. Ct. Rep. 384) the use of false brands or labels was held to be an unfair method of competition, the basis of the illegality of the methods being its deceptive character.

The two decisions last above referred to firmly establish the criteria for the interpretation of the act to be that applied in the *Gratz* case. It is contended that the practice attacked by the commission in this case is unfair and unlawful because of its dangerous tendency to hinder competition, because of its oppressive character, and because of its unlawful character when tested by common-law criteria which, it appears, are to be applied to the construction of the Federal Trade Commission act.

The practice here questioned, when used by the members of a trade association acting in cooperation, violates the Sherman law.

It is well established that the circulation among members of an association of retail dealers of the names of wholesalers engaged in interstate commerce selling direct to consumers, with the obvious purpose of having such retail dealers refrain from dealing with the wholesalers whose names appear on the list, constitutes an unwarranted obstruction and

interference with interstate commerce. (*Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600.)

Referring to the decision in the *Eastern States* case, the Supreme Court, in *Duplex Printing Press Company* v. *Deering* (254 U. S. 443, 467), says:

> In *Eastern States Retail Lumber Dealers' Association* v. *United States* (234 U. S. 600), wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association, of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in *Lawlor* v. *Loewe* (235 U. S. 522, 534): "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States."
>
> It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the

> participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Under the trade commission act the interference with interstate commerce is unlawful whether the method is employed by one or by many. No contract, combination, or conspiracy need be present, as in proceedings under the antitrust act, but a method which has the prohibited result, i. e., dangerous tendency unduly to hinder competition, is unlawful if employed by any person, partnership, or corporation.

The evidence clearly shows that there was an existing interstate traffic between manufacturers of various States and the Basket Stores Company, and that for the direct purpose of destroying such interstate traffic petitioner sought to induce the Snider Company to cease selling its products to the Basket Stores Company. Obviously, if petitioner's efforts had been successful, there would have been no more sales by the Snider Company to the Basket Stores Company, and interstate traffic between them would have ceased, the free flow of commerce between the States would have been obstructed, and the trade of the Basket Stores Company would have been restrained. (See *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38.)

Method employed oppressive within the Gratz decision.

The method used by the petitioner not only is calculated to hinder competition and therefore falls within the second class of practices condemned by the statute, but also is characterized by oppression as that term is used in the decision in the *Gratz* case. If a corporation engaged in interstate commerce may employ the strength of its buying power to prevent another from procuring a commodity in interstate commerce, upon which the very existence of the latter's business depends, it may follow such practices until the dealer against whom they are directed finds himself unable to purchase any commodities and automatically retires from business. By a similar line of conduct, a rival could not only be prevented from purchasing commodities but from securing advertising space in newspapers and magazines, and the channels of commerce completely closed to him.

If the method is unfair because calculated to have the consequences set forth, it is no defense that the record does not disclose that such consequences have already resulted from its use.

In the *Sears-Roebuck* case (258 Fed. 307) the Court of Appeals for the Seventh Circuit says:

> The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the Government as parens patriae, are to exercise their common sense, as informed by their knowledge

> of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases.

Similarly, in the *National Harness Manufacturers* case (268 Fed. 705), the court says:

> In view of what has appeared, the criticism of lack of public injury is without force. The suggestion that no damage has been shown, even if true in fact, is answered by the consideration that the remedy afforded by the statute is preventive, not compensatory.

The use of the methods here employed constitutes an unwarranted interference with the Basket Stores right at common law to a free market.

It is submitted that on principle the conduct of the petitioner constituted an unlawful interference at common law with the right of the Basket Stores Company to enter the business of a wholesale and retail dealer and to have business relations with any and all persons willing to deal with them. In a long line of decisions it has been held that business men may not combine to prevent others from having business relations with whom they will. In many cases, however, the element of combination or concerted action is not the ground of the decision. In civil cases involving conspiracy, the gist of the action is in most jurisdictions held to be the damage resulting from unlawful acts and not the conspiracy

itself, and it has sometimes been expressly held that the means employed to prevent persons from purchasing or selling goods were in themselves actionable.

Martell v. *White* (185 Mass. 255) was an action of tort based upon an alleged conspiracy to injure the plaintiff in his business. The defendants were members of a voluntary association of manufacturers, quarriers, and polishers of granite, one of the by-laws of which association provided that any member having business transactions with any party or concern not a member thereof, and in any way relating to the cutting, quarrying, polishing, buying, or selling of granite, should for each such transaction contribute at least $1.00 and not more than $500.00 to the support of the association. The plaintiff in that case was a quarrier of granite and had enjoyed a large business with some of the members of the association. As a result of fines ranging from $10.00 to $100.00 imposed on such members for dealing with him, the plaintiff's business was practically destroyed. Passing the question of the legality of the objection of the association and considering the means employed to effectuate its objects, the court held that to compel members of the association to refrain from dealing with the plaintiff by means of fines was unlawful and not justified by competition, saying in part:

> In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened

> injury to their property. It is true that one may leave the association if he desires, but if he stay in it, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. * * *
>
> In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

In *Brown & Allen* v. *Jacobs Pharmacy Company*, (115 Ga. 429, (1902), it was held that an association of retail druggists, formed for the purpose of maintaining prices and which sought to prevent any druggist who did not maintain prices from securing supplies, was unlawful and that an injunction would lie, at the instance of a dealer whose purchases of drugs from wholesalers were sought to be prevented,

restraining the members of the association, among other things, from "in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff as a cutter or aggressive cutter, and from conspiring and from seeking to prevent wholesalers or other druggists from dealing with or selling to plaintiff, by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff."

In the course of the opinion the court summarized several decisions relied on as follows:

> In *Reg.* v *Druitt* (10 Cox Cr. Cas. 593) it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body. * * * In *Olive* v. *Van Patten* (1894) (7 Texas Civ. App. 630), where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at points where there was a dealer; that because of the refusal of the plaintiff—a sawmill owner and dealer who was not a member—to join such association and his exercising the right to sell to others than

> dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury, it was held to state a good cause of action for damages and injunction. * * *
>
> In *Jackson* v. *Stanfield* (1894) (137 Ind. 592) it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber yard with an assorted stock of lumber, by coercing wholesale dealers to refuse to make sales to such brokers, or lose the business of the members of such combination, was unlawful, and rendered a member who procured action by the association to the injury of brokers liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person.

In some of the cases cited by the court in the *Brown & Allen* case, *supra*, the element of combination was involved in the decision, while in others the *ratio decedendi* is not very clear. In this line of cases as a whole, however, there is constant reference to the right of the plaintiff to conduct his business free from the interference of others. The definition of this right and the duty of others not to invade it is not to be found in many of the decisions. But in *Booth & Bro.* v. *Burgess* (72 N. J. Eq. 181), Vice Chancellor Stevenson, brushing aside all questions of combination, of malicious injury, of the wrongful or

unlawful character of the particular means, and of the limits of the justification of self-interest, harks back to the basic principle of all tort actions and seeks to ascertain what right of the plaintiff has been invaded and what is the correlative duty of the defendant. He concludes that in such cases the right of the plaintiff is "the right to a free market." The court says in part:

> The primary legal right, which it seems to me should be recognized as belonging to the complainant in the case, may be defined or described as the *right to a free market*. * * *
>
> We have the right to a free market, which is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect. Thus recognition is accorded to the "interest which one man has in the freedom of another." (*Jersey City Printing Co.* v. *Cassidy*, 63 N. J. Eq. 759.)
>
> The tort exhibited by the violation of the right to a free market consists in coercing the market, i. e., interfering with the right of a particular dealer to enjoy the advantages of *freedom* to deal with him on the part of all who may voluntarily desire to deal with him. * * *
>
> A fourth right, or a wide extension of the right above defined as the right to a free market, has undoubtedly been involved in if not expressly recognized by the decisions of some courts in strike and boycott cases. This wider right concedes to every man not only a free market but a market where transactions occur

> naturally according to the ordinary laws of trade and commerce, unaffected not only by coercion but also by persuasions or non-coercive inducements from outside parties applied by them with intent and with the effect to interfere with his dealings and thereby to cause him damage.

Whether this right to a free market be invaded by one or by many, it is equally actionable. In *Booth & Bro.* v. *Burgess*, supra, the court points to Lord Lindley's expression in *Quinn* v. *Leathem* (A. C. 495, 534, (1901):

> One man exercising the same control over others, as these defendants do, could have acted as they did, and if he had done so, I conceive that he would have committed a wrong toward the plaintiff for which the plaintiff could have maintained an action.

Respecting the wrongful character of the invasion of one's right to a free market by a single individual Sir Frederick Pollock, in his "The Law of Torts" (Tenth edition, p. 163), says:

> And since a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so (Lord Lindley in *Quinn* v. *Leathem*), it follows that coercing a man's workmen or customers not to work for or deal with him (as distinguished from refusing to deal with him one's self) is not an exercise of one's own right but a violation of his and actionable if willfully done to his damage. Such a thing is more likely to be done, and likely to be more

injurious if done by several persons than by one, but on principle it would seem immaterial if there be one wrongdoer or several.

An expression from a decision by the Court of Appeals of the State of New York in a recent case, *Auburn Draying Co.* v. *Wardell* (227 N. Y. 1, (1919), appears to be clearly in accord with the *Burgess* case, *supra*, and with the opinion expressed by Pollock in the excerpt quoted. The New York court said:

> But there is an important and perceptible distinction, in the realms of justice, civil order, and law, between the voluntary acts of an individual, done in the right of personal freedom, the right to do or to refrain from doing, and their injurious effects, and the acts of others, undesired by them, initiated and performed in virtue of the deception, compulsion, or oppression on the part of that individual, and their injurious effects. The individual may lawfully refuse to be employed to drive from his neighbor's field the stray cattle which are destroying the crop, and thus, in effect, coerce the neighbor to drive them himself or permit the destruction; but he can not lawfully prevent, through fraud or other form of dishonesty, or compulsion of any nature, another from becoming the employee for such purpose. He may lawfully do that which he can not lawfully attempt to compel another to do. The one is the exercise of the fundamental right of individual choice and volition; the other is the negation and destruction of the right. In the latter case the individual annihilates as to the

> others the right which he asserts and maintains for himself, and causes injuries as positively and aggressively as he would, did he intentionally disable the other or his industrial resources.

In the instant case the Basket Stores Company had the right at common law to purchase from and to sell to all persons who were willing to have business relations with it; and had the further right to have all persons willing to trade with it left free to do so.

The fact that it combined the business of wholesaling and retailing was not a penalty and was not unlawful, as was held by the court (C. C. A. 5th Ct.) in the case of *Wholesale Grocers Association of El Paso, Texas, et al.* v. *Federal Trade Commission* (277 Fed. 657 at 664). When the petitioner sought to compel or coerce the Snider Company not to sell to the Basket Stores Company, and demanded a commission for itself or for some other wholesaler on sales by the Snider Company to the Basket Stores Company, it invaded the Basket Stores Company's legal right to a free and uncoerced market. Its refusal to purchase from the Snider Company if it continued relations with the Basket Stores Company, coupled with the demand that in the event the Snider Company continued such relations it should take back from the petitioner all goods of its manufacture in its warehouses, was a further effort to coerce the Snider Company to refrain from business relations with the Basket Stores Company and was an actionable wrong against the latter company.

It matters not whether the effort to prevent the Basket Stores Company from purchasing as it saw fit was carried out by the petitioner alone or in association with or collusion with others, it was equally a violation of the Basket Stores Company's legal rights and of the right of the public to have the benefit of the competitive prices of the Basket Stores Company based on purchases of that company in an open and free market.

The purpose of the trade commission act was to insure to all business men and to the public the continuance of free and fair competition in a free and open market. The effort to prevent the Basket Stores Company from purchasing the subjects of commerce was coercive in its character and clearly oppressive within the interpretation of section 5 of the trade commission act.

There is here no question of the right of the respondent to deal or refrain from dealing with the Snider Company. The question is as to its right to prevent the Basket Stores Company from purchasing from those willing to sell to it. Whatever may be the right of the respondent in its relation with the Snider Company, it does not have a right to interfere with business of third parties by coercing the conduct of the Snider Company toward them. Confusion is introduced into these cases by the assumption that because a man may contract or refrain from contracting with a person he may injure the business of a third party by conduct which, if the rights of no third party intervened, might be lawful.

There was an illegal interference with established business relations.

The Basket Stores Company, having established business relations with the Snider Company satisfactory to both parties, had a legal right to have that relation respected by others, although the continuance of the relation was not secured by contract. In *Truax* v. *Raich* (239 U. S. 33, 38), this court says:

> The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable, although the employment is at will.

Again, in *Hitchman Coal & Coke Co.* v. *Mitchell et al.* (245 U. S. 229, 252):

> In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to deal with him. The value of the relation

> lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.
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> See also *International News Service* v. *The Associated Press* (248 U. S. 215, 236) and *American Bank & Trust Co.* v. *Federal Reserve Bank* (41 Sup. Ct. Rep. 499).

It is not fair competition to seek to destroy a competitor by preventing him from obtaining merchandise.

> Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.
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> *Hitchman Coal & Coke Co.* v. *Mitchell et al* (245 U. S. 259).

The law of competition affords no sufficient justification for acts of interference of the character here

involved. (*Martell* v. *White*, supra, p. 19; *Hitchman Coal & Coke Co.* v. *Mitchell*, supra, and cases cited in that decision.)

In the *Gratz* case this court held that practices contrary to good morals because characterized by deception, bad faith, fraud, or oppression were within the prohibition of the statute. These are common-law criteria of interpretation. By parity of reasoning competitive methods which are by common-law tests actionable wrongs are also prohibited. It is inconceivable that Congress, when seeking to purge interstate commerce of unfair methods, did not intend to include within its prohibition tortious or otherwise unlawful methods. Not that all unlawful acts are unfair methods of competition, but that competitive acts immediately connected with interstate commerce which are contrary to established principles of lawful competition are also within the prohibition of the statute. If this be correct, the foregoing presentation of common-law principles, it is submitted, sufficiently establishes that the methods employed in this instance were unfair.

It is submitted that the decision should be reviewed and the commission's order affirmed.

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